answer that question, we ask first whether the deprivation is "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible"; and second, whether the "party charged with the deprivation ... [is] a person who may fairly be said to be a state actor." *Id.* Here, the deprivation of First Amendment rights is "caused by ... a rule of conduct imposed by the State"—the rule requiring cable operators to ban or block a category of programming.[5] And the parties "charged with the deprivation," Congress and the FCC, are clearly "state actors."

Even if *Blum* did provide a legal analogy, which it does not, the factual record places it a galaxy apart. There is pressure in this scheme to push cable operators to ban indecent programming outright. Statements in the agency record by cable operators say that they view the § 10(b) segregation-and-blocking arrangement to be so technically and administratively cumbersome as to render it highly unattractive and indeed for many "unworkable." Joint Appendix ("J.A.") 195–97, 200, 253. *See also First Report and Order*, 8 F.C.C.R. at 1009, ¶ 69 (acknowledging technical and administrative burdens of blocking scheme).[6]

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[5] As Justice White explained in his concurrence in *Blum*, the private parties' decisions there were not based on any rule imposed by the state. 457 U.S. at 843 (White, J., concurring).

[6] The Commission noted that "the new blocking requirements may be difficult for some cable systems that are not as technologically advanced as addressable systems" and "may require considerable adjustments ... in terms of rearranging existing services...." *First Report and Order*, 8 F.C.C.R. at 1009 ¶ 69. *See also* J.A. 253 (comments of Time Warner Entertainment Company, noting "technological problems" faced by nonaddressable systems). "In addition, the new regulations will require cable operators to establish new procedures for subscriber notification ... and for the processing of requests of leased access users and of subscriber requests for this channel, etc." 8 F.C.C.R. at 1009 ¶ 69. Finally, the Commission noted the special difficulties faced by "systems that require trapping devices to circumscribe access to these services." *Id.* Some "trapping" technology would require the operator to send out

In addition, as the majority itself concedes, Maj. op. at 23–24, the Commission has yet to decide who will absorb the potentially high cost of the § 10(b) segregation-and-blocking scheme. If the cost falls on cable operators, as it presumptively must at least temporarily until the Commission authorizes a shift to subscribers or lessees, operators have a strong financial incentive, as well, to ban rather than block. *See* J.A. 200–01 (comments of Community Antenna Television Association, Inc.). Somewhat puzzlingly, the majority argues that because the Commission has not yet decided whether to allow cable operators to shift these costs, we do not know if operators will have a financial incentive to ban rather than block, and therefore petitioners have not met their burden of showing state action. Maj. op. at 23–24. That seems to me a notion at odds with our traditional constitutional test for state action. Surely the agency's delay in stating who will ultimately bear the financial burden of its scheme cannot postpone constitutional review indefinitely, once the scheme is in operation. And clearly the *present* regulations do not authorize operators to shift the costs of segregation-and-blocking to subscribers or lessees. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 F.C.C.R. 5631 ¶¶ 506, 516–20 (1993) (Commission sets maximum rates operators may charge lessees, based on annual calculation of "implicit fee" paid by nonaffiliated commercial programmers, with no provision for

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employees to place signal-interdicting "traps" at each subscribing household, and to remove them when the subscriber requested the blocked service. *See* J.A. 244 (comments of National Cable Television Association, Inc.). Nor are the incentives created by these complexities simply a matter of whether the costs are recoverable. Even if cable operators were allowed to recover their costs under the § 10(b) blocking scheme, cancelling out its cost disadvantages, opting for the § 10(b) blocking scheme would still require the cable operator in many cases to hire, train and supervise additional personnel, invest in new equipment, and develop and implement additional recordkeeping procedures. *See* J.A. 200. Sound management principles suggest that if either alternative would produce the same net revenue, the less technically and administratively complex option would be preferred.

cost-based adjustments). Until the Commission takes affirmative measures to allow cost-shifting, any operator undertaking segregation-and-blocking under § 10(b) bears the expense without any promise of recoupment. He therefore has a financial incentive to ban rather than block.

On the basis of the combined technical, administrative, and financial burdens imposed on cable operators under § 10(b), I have no difficulty even under a *Blum*-type rationale in concluding that the § 10 regulatory scheme "significantly encourages" them to ban indecent speech, thereby converting the cable operator's decision to ban under § 10(a) into state action.[7]

In sum, §§ 10(a) and (b) in tandem constitute state action.[8]

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[7] For the reasons detailed in Part IV.B. *infra*, I believe § 10(a) would be constitutionally impermissible even if it stood alone—which, of course, it does not. Given the structure of the statutory provisions affecting leased access programming, and their avowed purpose to "*forbid* cable companies from inflicting their unsuspecting subscribers with sexually explicit programs on leased access channels," 138 CONG. REC. S646 (daily ed., Jan. 30, 1992) (statement of Sen. Helms), I do not think § 10(a) is severable from § 10(b). The "relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (emphasis in original). If we were to strike down § 10(b) and leave § 10(a), cable operators would be left with discretion whether to "inflict[ ] their unsuspecting subscribers with sexually explicit programs," flatly contradicting the stated purpose of the provisions.

[8] The majority also rejects petitioners' alternative argument, that because leased and public access channels are a "public forum" for purposes of First Amendment analysis, the government may not authorize private parties to censor speech there.

It is a close question. While the legislative history of the 1984 Cable Act uses the term "public forum" in describing leased and public access channels, admittedly there is no clear indication that Congress was using that term in its technical First Amendment sense, classifying cable access channels with such traditional public fora as parks and streets. However, I disagree with the majority's suggestion that a public forum can *never* exist on private property.

II. Sections 10(a) and (b) Cause a Deprivation of First Amendment Speech Rights

The majority relies on the untenable notion that requiring adults to separately request "indecent" leased access programming in writing, wait up to 30 days to receive such service, and possibly be required to pay extra for it, poses no burden whatsoever on the speech rights of either the speakers or receivers of such speech. *See* Maj. op. at 37–38. This does not square with reality. If the government imposed similar restrictions on other categories of speech, such as speech concerning nuclear power or criticism of government officials, and required that citizens could receive it only after separately requesting it in writing and then waiting up to 30 days to receive it, we would almost surely say that the speech rights of both speakers and listeners were unduly burdened. In *Lamont v. Postmaster General*, 381 U.S. 301 (1965), the Supreme Court struck down a statute providing that the Post Office deliver "communist propaganda" only upon written request in advance from the recipient. The Court ruled "on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered," *id.* at 307,

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See Maj. op. at 28–31. In some circumstances private property dedicated to public uses could become a limited public forum, through some combination of legally binding use restrictions and an established tradition of use for speech purposes. A land swap, zoning approval, or building permits, for example, might be made conditional on a private property owner's agreement to permanently set aside part of his property for public access and use, including traditional First Amendment speech activities, either to substitute for or to supplement "traditional" public fora like parks and streets. Such use restrictions, perhaps in combination with a tradition of actual use for such speech purposes, might create a public forum. Similarly, Congress might create a public forum by insisting that privately owned communications media dedicate a portion of their capacity to unrestricted public access for speech purposes. Nonetheless, I would not reach the question of whether Congress created a public forum in this case because I find state action present in the statutory scheme itself.

and thus the recipient "carries an affirmative obligation which we do not think the Government may impose on him." *Id.*[9] Advance notice and registration requirements "drastically burden free speech" because they "stifle" the spontaneity and immediacy of expressive activities and "chill[ ] ... the exercise of first amendment rights." *Rosen v. Port of Portland*, 641 F.2d 1243, 1249 (9th Cir. 1981) (striking down requirement that speakers wishing to exercise First Amendment rights in port facilities must register in writing at least one business day in advance). Our concern in such cases is that, by singling out a disfavored class of speech and requiring that audiences take special, affirmative steps to receive it, the government effectively blocks many potential listeners from hearing it, and impairs many speakers from providing it. These results are "at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by

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[9] Attempting to distinguish *Lamont*, the majority misstates the "narrow ground" upon which the Supreme Court relied. *See* Maj. op. at 38 n.23. The passage more fully reads:

> We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgement of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him.

Lamont, 381 U.S. at 307. The Court then discussed the requirement's "deterrent effect," noting that some vulnerable government employees would fear for their livelihoods if they requested forbidden literature. But "[a]part from them, *any* addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.' " *Id.* (emphasis added). *Lamont*, then, says such requirements burden speech in two ways: first by placing an "affirmative obligation" on the recipient, and second by branding the speech with government disapproval. *See also id.* at 309 (Brennan, J., concurring) (rejecting government's argument that the requirement is "only inconvenience and not an abridgement," because "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government").

the First Amendment." *Lamont*, 381 U.S. at 307 (citation omitted).

In the first place, such disparate treatment clearly implies governmental disapproval of the speech in question, and it is beyond cavil that some stigma attaches to a written request to receive it. *Cf. Lamont*, 381 U.S. at 307 (placing affirmative duty on recipient of content-defined speech "is almost certain to have a deterrent effect" because the recipient "is likely to feel some inhibition in sending for literature which government officials have condemned...."); *Rosen*, 641 F.2d at 1251 ("Identification requirements impose heavy burdens on the exercise of first amendment rights" because stigma and fear of reprisals will deter many from engaging in disfavored speech activities.).

More importantly, as the majority itself implicitly recognizes, only those who identify themselves as having a compelling interest in receiving the segregated category of speech are likely to take the special affirmative steps necessary to receive it. *See* Maj. op. at 37–38. Others with a milder level of interest or a lesser commitment to challenging the government's disapproval may lack the boldness to step forward and request it, or the initiative to take the affirmative steps necessary to gain access to the sealed-off information. Some may never even become aware that the speech may be received upon special request. Almost certainly fewer people will ultimately hear such speech. And under the new economic realities of a diminished market for their product as a result of governmental intervention, potential producers of such controversial speech will be disinclined to create it. Thus can government-imposed access barriers effectively squelch constitutionally-protected speech.

Yet the majority insists that so long as those who want access to a content-based class of speech *ultimately* may receive it, the government may, without constitutional consequence, freely place obstacles in the way of their receiving it. As a general proposition, this is surely inconsistent with our constitutional traditions of free speech and the unimpeded flow of ideas. We would not so easily tolerate such direct

governmental interference with other categories of speech. *Cf. Lamont*, 381 U.S. at 307; *Rosen*, 641 F.2d at 1252. One suspects that, *sub silentio*, the majority is leaning on a judgment that "indecent" speech is entitled to such a lesser degree of protection than other constitutionally-protected categories of speech that the same rigorous standards of constitutional testing do not apply.

Finally, the majority's arguments are fundamentally inconsistent with the realities of television viewing. The market for "indecent" speech does not break down neatly, as the majority suggests, into self-identified groups of those who want indecent speech in their homes, and those who do not. *See* Maj. op. at 38. Many viewers fall somewhere in between. They may not want a steady stream of "indecent" speech, and probably do not want to be perceived (even by their cable operator, much less anyone who might later acquire such information by subpoena or otherwise) as the kind of people who do. They therefore will not affirmatively write for access to the "indecent" channel even if they become aware of it. Yet given a free choice in the matter, they might prefer to have unimpeded, selective access to some but not all programs that fall within that broad umbrella designation. Not only *aficionados* of the arts or of politics but also the mildly curious might well decide to watch an "unvarnished" documentary on the Mapplethorpe exhibit if it is readily available, for example, but may not write to request an entire channel of indecency on the chance that this and similar programs will be included. They may want to shield their children from most "indecent" programming, yet may occasionally find it appropriate to expose older children to frank, even graphic discussions of sexuality and the AIDS epidemic, including some programs that might fall within the FCC's definition of "indecency" (or at any rate are close enough to the line that cable operators will ban them altogether or relegate them to the "indecent" channel). Whether they are "channel surfers" who like to browse before settling on a program, or "appointment viewers" who prefer to study a program guide and watch pre-selected programs, this regulation makes it substantially *more* difficult for cable subscribers to selectively

control the content of their viewing on a program-by-program basis. It thus places a substantial burden on their speech rights as adult television viewers, while adding nothing to their ability to exercise *selective* control over their children's viewing. "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2458 (1994). So too, when it comes to umpiring the "decency" of the communications permitted into our homes, the government's role should be restricted to one which supports not replaces society's primary institution for moral education—the family.

III. Sections 10(a) and (b) Do Not Meet the "Least Restrictive Means" Test

A. *What Does the Test Require?*

"Content-based regulations [of speech] are presumptively invalid," *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992), and are "subject ... to the most exacting scrutiny," *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (quotation and citation omitted). The Supreme Court has reiterated many times that a content-based regulation of speech must be "the least restrictive means" to achieve a compelling governmental interest. *Sable*, 492 U.S. at 126. "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Id.* To survive strict scrutiny, then, a content-based regulation must be "precisely drawn" to serve a compelling state interest. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980).

Supreme Court precedent certainly rejects the notion that a content-based regulation of speech will survive regardless of the burden on speech simply because it is the most effective means to achieve a compelling state interest. Quite the opposite. In *Sable*, for example, the government argued that a *total* ban on telephone transmission of indecent speech was

the *most* effective, indeed the *only* fully effective way to achieve the government's compelling objective of protecting children. 492 U.S. at 128. Yet the Supreme Court decisively rejected that argument, conceding that means other than a total ban might be *less* effective.[10] The Court said that a flat ban on indecent speech was not "the least restrictive means to further the articulated interest," *id.* at 126, because its "denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages," *id.* at 131, and thus the challenged regulation was not sufficiently "carefully tailored." *Id.* at 126. As *Sable* demonstrates, a regulation can be the *most* effective means of achieving a compelling interest and still run afoul of the First Amendment if it burdens substantial amounts of protected speech beyond what would be reasonably effective in serving the compelling interest. Here, too, as in *Sable*, the precision demanded of a content-based regulation is decidedly missing.

B. *What Are the Compelling Interests?*

1. *Protecting Children*

The government asserts a compelling interest in "shielding minors from the harmful effects of indecent programming" entering their homes on cable television. Government Brief at 37. *See also Sable*, 492 U.S. at 126 (government has a compelling interest in "protecting the physical and psychological well-being of minors" which "extends to shielding minors from the influence of literature that is not obscene by adult standards"); *FCC v. Pacifica Foundation*, 438 U.S. 726, 749 (1978). The exact nature of that interest, however, is left unclear in both the government's brief and the majority's opinion. The majority argues somewhat inconsistently that

[10] The Court said that while technological means of protecting children from indecent telephone messages might not be "fail-safe" or "foolproof," 492 U.S. at 130 & n.10, nonetheless there was nothing in the record to establish that they would not be "extremely effective." *Id.* at 130. Thus while the Court required that such alternative, less restrictive means be "effective," it did not require that they be shown to be equally as effective as a total ban.

the statute and regulations are aimed at assisting parents in protecting children from indecent speech; and that because parents are not doing an adequate job of supervising their offsprings' viewing, the government must do it for them by keeping indecent programs out of reach. *See* Maj. op. at 39 (citing both rationales but treating them as one). While not inescapably irreconcilable, these goals are often in tension.

If the justification for the ban-or-block scheme is that it will assist parents in monitoring their children's viewing, § 10 is certainly not precisely crafted to do that job. Rather than enhance parental control, it merely deprives all adults as well as children of *any* choice if their cable operator exercises regulatory option (a) and bans indecent programming. Alternatively, if the cable operator does not ban indecent programming altogether, adult viewers are left with a single blanket choice under § 10(b), whether to affirmatively invite the complete repertoire of the "indecent" channel into their home (and perhaps to pay for it). They may either keep *all* indecent leased access speech out of their homes, or let *all* indecent programming in, thereby providing their children with unimpeded access to such programming.[11] Of what help to parents is that?

In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Supreme Court struck down a statute prohibiting advertisers from mailing unsolicited advertisements for contraceptives to home addresses, on grounds that the ban was not precisely drawn to achieve the government's interest. Although the government argued the statute was designed to "aid[ ] parents' efforts to discuss birth control with their children," the Court said the statute "provides only the most limited incremental support for the interest asserted." *Id.* at 73. While broadly burdening *all* adults by making it more difficult for them to gain access to a constitutionally-protected

[11] Parents who elect to receive indecent programming can still use "lockboxes" to lock out selected channels, of course. But in that case, it is the lockbox and not the § 10(b) blocking scheme that is doing all the useful work in shielding children from indecent programming. *See infra* Part III.C.

category of speech, the statute aided only one narrow class of parents, those "who desire to keep their children from confronting such mailings, [but] who are otherwise unable to do so." *Id.* The *Bolger* case is remarkably similar to ours. The statute and regulations here broadly burden all adults, while assisting only the much narrower class of parents who desire to shield their children from all indecent programming but for whatever reason—absence, fatigue, or unwillingness to work it out—feel unable to do so.

As to the government's second prong, a purist interest in protecting children, regardless of their parents' desires—a justification about which we have grave doubts—the government has notably failed to build any record that parental control of children's television viewing is not reliable by itself and must be supplemented or even overridden by a government censor. Congress and the FCC have in the past relied principally as a justification for regulating indecent cable programming on the need to aid parental supervision and guidance. *See* H.R. REP. No. 934, 98th Cong., 2d Sess. 70 (1984). Governmental restrictions directly interfering with parents' rights to control the information their children receive are regarded with suspicion "regardless of the strength of the governmental interest." *See Bolger*, 463 U.S. at 75. In particular, as demonstrated *infra* in Part III.C., there is no record in the agency here demonstrating that measures currently available such as lockbox technology have been markedly ineffective in shielding children from access to indecent leased access programming. On the other hand, the government has not established that the ban-or-block requirement is sufficiently precise not to overshoot its objective. Adults who desire access to any indecent speech on leased access channels will be entirely deprived or required to specifically request in writing access to an entire channel of it 30 days in advance. If parents choose to request such programming, their children, of course, will also be exposed to it. In fact, the regulation does next to nothing to decouple children's access to indecent programming from adults' access, or to protect children whose parents purposefully bring indecent programming into the home.

To the extent §§ 10(a) and (b) "protect" children at all, they do so by relying on cable operators to ban indecent speech entirely; or on parental inaction in not subscribing to the segregated channel. The degree to which children are protected is directly tied to the degree to which adult access is curtailed, contrary to the well-established principle enunciated in *Butler v. Michigan* that statutes designed to protect children may not "reduce the adult population . . . to . . . only what is fit for children," 352 U.S. 380, 383 (1957), and in *Bolger*, that "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." 463 U.S. at 74.

In this crucial respect, the provisions at issue here differ from the FCC's regulations on indecent telephone communications,[12] which allow adults to retain instantaneous and relatively effortless access to such speech through means

[12] Senator Helms argued on the Senate floor that the § 10(b) segregation-and-blocking requirement "is precisely the same method that Congress used to block dial-a-porn lines," a method which the courts had "validated." 138 CONG. REC. S646 (daily ed., Jan. 30, 1992). The Commission similarly argued that "[t]he blocking scheme upheld in these [telephone] cases is, in all relevant respects, identical to that required by section 10(b)." 8 F.C.C.R. at 1000 ¶ 13. These comparisons, however, are highly inaccurate. As the Ninth Circuit observed in *Information Providers' Coalition v. FCC*, 928 F.2d 866, 872 (9th Cir. 1991), the telephone "reverse blocking" scheme, under which telephone companies block all access to providers of indecent speech unless consumers specifically request it in writing, is just one of several alternative access methods permitted under the telephone regulations, and is required only if the message provider elects to bill through the telephone carrier. If the message provider bills directly, it may rely instead on credit cards, access codes, or consumer-controlled descrambling devices to screen out children's access, while allowing adults virtually unimpeded, instantaneous access. Thus in considering whether telephone blocking is the least restrictive means, the court emphasized, "it is critical that the [blocking] system not be considered *in vacuo*" but instead must be seen as part of a "multi-tiered" regulatory scheme which affords both speakers and adult listeners numerous alternative, less burdensome avenues of communication. *Id.*

such as credit cards, access codes, and consumer-controlled descrambling devices, thereby effectively decoupling children's access from that of adults. *See Information Providers' Coalition v. FCC*, 928 F.2d 866, 872 (9th Cir. 1991); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 557 (2d Cir.) (analogizing these approaches to requirements that sexually oriented magazines be kept under opaque covers or in separate adults-only sections of bookstores; "[i]n each case adults continue to have access to the materials, with minimal inconvenience, while minors' access is restricted"), *cert. denied*, 488 U.S. 924 (1988). *See also Enforcement of Prohibitions on the Use of Common Carriers for the Transmission of Obscene Materials*, 2 F.C.C.R. 2714, 2719 ¶ 32 (1987) (Commission's objective in designing telephone indecency regulations was "to select the option effectively restricting access to the communications in question *to adults* which is the least intrusive upon protected forms of expression") (emphasis added). By foreclosing children's access in a reasonably effective manner and only minimally burdening adults' access, the telephone regulations achieve the precision of regulation required by First Amendment jurisprudence. No such precision was attempted in these cable regulations.

2. *"Uninvited Intruder"*

The majority posits an additional governmental interest: protecting citizens from the uninvited "intruder" of indecent programming.[13] Maj. op. at 33–34. In the *Pacifica* case, the Supreme Court noted that indecent broadcasts "confront[ ]

[13] The government argues in a footnote to its brief that this is a "legitimate" governmental interest, but nowhere does it suggest that it rises to the level of a "compelling" interest. *See* Government Brief at 37, n.16. Since only a *compelling* governmental interest can sustain a content-based restriction of speech, the government must be deemed to have waived the argument that this justification is sufficient to support the challenged statute and regulation, although the argument had been advanced at the agency level, *see* 8 F.C.C.R. 999–1000, and on the Senate floor, *see* 138 CONG. REC. S648 (daily ed., Jan. 30, 1992) (remarks of Sen. Thurmond). I address the question here, however, in response to the majority's reliance on this rationale.

the citizen . . . in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica*, 438 U.S. at 748. But whether this rationale could pass the compelling interest test in the broadcast arena, it cannot qualify in the cable context. The FCC itself takes the position that although cable television too enters the home, it comes as an *invited* guest. *First Report and Order*, 8 F.C.C.R. at 1001 ¶ 17 ("Cable television . . . may well be viewed as an invitee into an individual's home"). *See also Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164, 1167–69 (D. Utah 1982). Subscribers not only consent to, but must affirmatively request cable service. Like magazine subscribers, cable subscribers pay for the service and are free to cancel their subscription at any time if they do not like the programming they receive. Cable television service is indeed popular,[14] but its widespread dissemination does not transform it from an invitee to an intruder. *Compare Pacifica*, 438 U.S. at 748–50 (emphasizing narrowness of holding based on "uniquely pervasive" nature of broadcasts over public airwaves), *with Bolger*, 463 U.S. at 74 (declining to extend *Pacifica* rationale to mailed advertisements even though mail service is universal).

The government could conceivably have an interest in helping consumers "tailor their invitation" to cover only the cable programming they want. But at least with regard to *adults*, that interest surely cannot be a compelling one. In

[14] The majority correctly points out that more than 60% of all households with televisions subscribe to cable. The majority then adds that "[m]ost cable subscribers do not or cannot use antennas to receive broadcast services," perhaps inadvertently leaving the mistaken impression that without cable, most current subscribers would be left with no television at all. In fact, the quoted passage merely indicates that *while subscribing to cable*, most households do not *simultaneously* receive over-the-air broadcasts. *See* H.R. CONF. REP. No. 862, 102d Cong., 2d Sess. 57 (1992). Although some consumers are in areas without broadcast service, many (probably most) of these households could and would receive television broadcasts if they terminated cable service.

Bolger, the Supreme Court said that the state's interest in "shield[ing] recipients of mail from materials that they are likely to find offensive" "carries little weight" because "[a]t least where obscenity is not involved . . . the fact that protected speech may be offensive to some does not justify its suppression." *Bolger*, 463 U.S. at 71 (citation and quotation omitted). The First Amendment "does not permit the government to prohibit speech as intrusive unless the 'captive' audience *cannot avoid* objectionable speech." *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 541–42 (1980) (emphasis added). As the FCC has repeatedly acknowledged, those adults who object to indecent speech on leased access channels may easily avoid such speech either by cancelling their cable subscriptions and relying on broadcast television as an alternative, or by blocking indecent programs or offensive channels through voluntary lockboxes. *See Broadcast Indecency*, 67 Rad. Reg.2d 1714, 1726 ¶ 62 (1990) (need to regulate indecency is far greater for broadcast than for cable because lockboxes give households control over cable programming entering the home); *Notice of Inquiry*, 4 F.C.C.R. 8358, 8364 ¶¶ 50–51 (1989) (suggesting regulation of broadcast indecency is justified in part by availability of cable as an "alternative" means of adult access to indecent programming where *Pacifica*-type concerns are not implicated due to availability of lockboxes to control access). The "intrusiveness" rationale cannot sustain the challenged provisions.[15]

C. *Do Sections 10(a) and (b) Meet the Least Restrictive Means Test?*

The government has the burden of showing that the means adopted to achieve the compelling governmental interest are

[15] In *Pacifica*, the Supreme Court rejected the argument that an individual offended by indecent broadcasts might simply turn off her set, which the Court analogized to "saying that the remedy for an assault is to run away after the first blow." 438 U.S. at 748–49. In the cable context, however, the options of not subscribing or locking out offensive channels are *in addition to* the option of turning off the set. No similar options are available for broadcast media.

the "least restrictive." *See Sable*, 492 U.S. at 126; *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 74 (1981); *Carlin Communications*, 837 F.2d at 555 ("The Government bears the heavy burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression.") (citation and quotation omitted).

As petitioners point out, however, nothing in the record establishes that cable lockboxes—which cable operators are required to provide [16]—are not an effective means of protecting children from "indecent" programming. Indeed, the record strongly suggests otherwise, and even the majority apparently concedes the effectiveness of lockboxes, Maj. op. at 38 n.22. Congress has found lockboxes to be "effective." *See* H.R. REP. No. 934, 98th Cong., 2d Sess. 70 (1984) (describing lockboxes as a "means to effectively restrict the availability of such [indecent] programming, particularly with respect to child viewers, without restricting the First Amendment rights of the cable operator, the cable programmer, or other cable viewers"). The Commission on several occasions has attested to their efficacy. *See, e.g.*, FCC 85–179, 1985 FCC Lexis 3475, ¶ 132, at *112–13 ("Indeed, we believe that the provision for lockboxes largely disposes of issues involving the Commission's standards for indecency ...."); *id.* at ¶ 139, *115 (deleting a previous FCC rule barring cable operators from transmitting indecent origination programming, because the rule had become "duplicative of and indeed surpassed by" the lockbox requirement and other provisions of the 1984 Act under which "the public will continue to be protected from

[16] The 1984 Cable Act requires each cable operator to "provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber." 47 U.S.C. § 544(d)(2)(A). These in-home devices, known as "lockboxes" or "parental keys," allow subscribers at their own discretion to block reception of any channels they do not wish to receive, either indefinitely or for shorter periods of time. Lockboxes thus allow parents to restrict their children's access to selected channels "whether or not parents are physically present and actively supervise." FCC 90–264, 5 F.C.C.R. 5297, 5305 (1990).

obscene and indecent programming"); FCC 90–264, 5 F.C.C.R. 5297, 5305 (1990) ("Technical means are available to block children's access to indecent cable programs.... [Lockboxes] can restrict access by children whether or not parents are physically present and actually supervise."). Not only cable programmers, but cable operators submitted comments during this rulemaking stating that lockboxes are effective. *See* J.A. 94 (programmers); J.A. 250, 253 (operators).

Because the 1992 Cable Act indecency provisions were adopted in a series of floor amendments, without benefit of committee hearings or even substantial floor debate, their legislative history is exceedingly scant. But nowhere in that meager history is there a single comment that anyone in Congress thought cable lockboxes ineffective. *See* 138 CONG. REC. S646 *et seq.* (daily ed., Jan. 30, 1992) (no mention of lockboxes in Senate floor debate); H.R. CONF. REP. No. 862, 102d Cong., 2d Sess. 80 (1992) (no mention of lockboxes in conference report describing section 10).[17] Nor did the Commission add any significant findings of its own with respect to the effectiveness of cable lockboxes during this rulemaking. *See First Report and Order*, 8 F.C.C.R. at 1000 (stating in conclusory fashion, without specific findings, that "[w]e agree with Congress' conclusion that the voluntary lockbox ap-

[17] Senator Helms did erroneously attribute to the Supreme Court the view that "mandatory blocking" in general "is constitutional and far more effective than voluntary blocking," 138 CONG. REC. S647 (daily ed., Jan. 30, 1992). In fact, the opinion he cited, *Dial Info. Serv. Corp. v. Thornburgh*, 938 F.2d 1535, 1542 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992), was authored by a panel of the Second Circuit, and its conclusions reached only the telephone technology involved in the case before it. In any event, Senator Helms's conclusory approbation of that court's decision cannot be taken to represent a considered judgment by Congress concerning the effectiveness of cable lockbox technology. *Cf. Sable*, 492 U.S. at 129–30 (conclusory statements in floor debate unsupported by legislative findings or indications of considered legislative judgment not entitled to great weight).

proach is not likely to be as effective as cable operator-blocked channels").

The government nonetheless leans heavily on the analogy to telephone technology, suggesting that "voluntary blocking" techniques are ineffective as a means of shielding children from indecent speech. The FCC, however, promulgated its telephone indecency regulations based upon extensive and detailed findings that voluntary blocking was not effective *in the context of telephone technology. See Regulations Concerning Indecent Communications by Telephone*, 5 F.C.C.R. 4926 (1990). The Commission did not conclude that voluntary blocking was in principle unworkable across all technologies; nor did it reach any conclusions whatsoever about cable technology. Instead, the findings were based entirely on considerations specific to telephone technology. That technology is fundamentally different from cable.

First, the Commission found that in the telephone context voluntary blocking was ineffective because telephone companies were able to block only *local* dial-a-porn providers, and for technological reasons were incapable of blocking *long-distance* access to dial-a-porn services. *Id.* at ¶ 16 (telephone blocking technology works by recognizing first three digits of seven-digit local phone number, and blocking three-digit sequences assigned to dial-a-porn services); *see also Information Providers' Coalition*, 928 F.2d at 873. Consequently, voluntary telephone blocking does not prevent minors from accessing dial-a-porn services by long distance calls. That concern is inapplicable in the cable television context, because lockboxes can block *any* channel received in the home.

Second, the Commission found that voluntary telephone blocking was ineffective because telephones, including pay phones, are ubiquitous and readily accessible to children outside the home. 5 F.C.C.R. 4926 at ¶ 16. Although cable television is widely available, it is not nearly as accessible to unsupervised children outside the home as is telephone service. Pay phones in particular provide individual, unsupervised, private access to indecent communications on street corners and in shopping malls, movie theaters, restaurants, gas stations, parks, and playgrounds.

Third, the Commission found that voluntary blocking was ineffective in the telephone context because many parents were not even aware that dial-a-porn services existed, much less that voluntary blocking technology was available. Id. at ¶¶ 18, 20; *see also Dial Info. Serv.*, 938 F.2d at 1542 (half of residential households in New York were unaware of either dial-a-porn services or blocking technology). The level of parental awareness of indecent programming and lockbox technology is far greater in the cable context. Unlike telephone subscribers with access to literally millions of telephone numbers, cable subscribers typically receive only a few dozen channels, and parents would have to be hermits to be unaware through newspapers and even television itself of the debate over sex and violence on the tube. Parental unawareness of indecent cable programming at the level of telephone porn has not been established anywhere in the agency record. The Commission's convincing showing that telephone blocking technology was ineffective at shielding minors has no parallel in this case.

The majority accepts—too readily, I think—the government's contention that because the operator can establish no central editorial control on leased access channels, indecent speech comes into the home more "intermittently and randomly" on leased than on regular channels, thereby defeating the effectiveness of lockbox technology. *See* Maj. op. at 34–36. Because indecent programming can appear on leased access channels at any time, the FCC says, parents must either lock out leased access channels altogether (thus depriving adults in the household of *all* leased access speech), or monitor leased access channels continually, locking and unlocking the control boxes, risking "a slip up or a lapse" that exposes their children to indecent programming. Maj. op. at 35. Less drastic alternatives, however, immediately come to mind. *Segregating* indecent leased access programming, either by channel or by time (*i.e.*, a reasonable "safe harbor" period), would actively facilitate parental control because parents could use *lockbox* technology more effectively, knowing which channels to lock out, and at which times, to protect their children. Neither Congress nor the FCC has considered whether segregation of indecent leased access program-

ming, when combined with existing lockbox technology, might be an effective yet far less restrictive means of achieving the statute's purported goals than the § 10 ban-or-block scheme.

The majority also suggests that the cost of lockboxes may deter some parents from acquiring and using them. Maj. op. at 38. But again, if this is a real impediment (and there is no record support to show it is), less restrictive means than a ban-or-block scheme are at hand. Cost-spreading—raising everyone's costs the small amount it would take to provide free lockboxes to all takers—would make lockboxes readily available. In fact, many cable operators have already converted to "addressable" systems that incorporate lockbox technology into the cable box that every subscriber receives. *See* J.A. 316–17. These addressable systems accomplish both cost-spreading and universal availability of lockbox technology. Neither Congress nor the FCC considered this new advance in technology.

Finally, neither Congress, the FCC, nor the majority has taken account of where the cost burden of the segregate-and-block scheme will fall, and with what implications for free speech. There are only a few prospects: the cable operators, producers of "indecent" speech, leased access programmers generally, subscribers to "indecent" speech, or subscribers generally. The majority concedes that if the cost is borne by cable operators, it could create sufficient incentives for operators to ban (rather than block) indecent programming so as to implicate state action, and therefore to invalidate § 10(a) as an indirect form of state censorship. *See* Maj. op. at 24. But the majority never considers that if the cost of segregation-and-blocking is placed entirely on programmers of "indecent" speech—or on those who wish to receive such speech—the regulation will place a direct and heavy burden on a content-defined class of constitutionally protected speech. Whether that burden would be so great as to actually deter such speech, we cannot say; nothing in the record warrants a conclusion either way. But if the burden is on the *government* to show that its content-based regulation is the least restrictive means, it must face and explain away those potential problems.

IV. State Action Is Indeed in Section 10(c) and It Does Not Meet the "Least Restrictive Means" Test

A. *Does State Action Inhere in Section 10(c)?*

State action also inheres in the statutory scheme of § 10(c). In the 1984 Cable Act, Congress authorized local franchising authorities to require cable operators to set aside channels for noncommercial public, educational, and governmental use ("PEG access"), 47 U.S.C. § 531(b), and forbade cable operators from exercising any editorial control over programming on those channels, 47 U.S.C. § 531(e).[18] Then, in § 10(c) of the 1992 Cable Act, Congress changed the rules with regard to a content-defined category of speech, authorizing cable operators "to prohibit the use [of PEG channels] for any programming which contains ... sexually explicit conduct," Pub. L. No. 102–385, § 10(c), 106 Stat. at 1486, which the FCC has interpreted to mean "indecent" programming, *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 19,623, 19,626 (1993).

Quite plainly, the revised statutory scheme is on its face a content-based regulation of protected speech. "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of their ... [content] are content-based." *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994). Under the statute, cable operators and programmers are subject to two fundamentally different statutorily-assigned schemes of substantive and procedural rights, duties, and burdens with respect to PEG programming. Which of those schemes applies depends solely on whether the content of the programming meets the government's definition of "indecent." *Cf. id.* at 2459 ("Our precedents ... apply the most exacting scrutiny to regula-

[18] Section 531(e) contains an exception, however: cable operators may under certain circumstances ban programming that is "obscene or ... otherwise unprotected by the Constitution of the United States." 47 U.S.C. § 544(d)(1).

tions that suppress, disadvantage, or *impose differential burdens* upon speech because of its content.") (emphasis added); *id.* at 2460 (must-carry rules are not content-based because they "impose burdens and confer benefits [on cable operators and broadcasters] without reference to the content of speech" and "interfere with with cable operators' editorial discretion" even-handedly, so that "the extent of the interference does not depend on the content of the ... programming"). The result is that under the government's scheme of differential regulation, indecent speech—as defined by the government—alone is subject to banning by cable operators.[19] To borrow language from the original panel opinion, "the government first strips a cable operator of editorial power over access channels, then singles out material it wishes to eliminate, and finally permits the cable operator to pull the trigger on that material only." *Alliance for Community Media v. FCC*, 10 F.3d 812, 821 (D.C. Cir. 1993), *vacated*, 15 F.3d 186 (1994).

What reason could Congress possibly have for assigning operators and programmers different rights, duties, and procedures on the basis of such a governmentally-defined content distinction? The only answer is that the government disfavors "indecent" speech, and seeks through this differential regulation to limit speech in that disfavored category—a purpose the government does not disavow. This purpose has nothing to do with restoring genuine "editorial control" to

[19] Although our emphasis is properly on the statutory scheme of § 10(c) itself, which petitioners challenge here, it is also clear that the nature of the cable operator's decision to ban indecent programming under § 10(c) is of an entirely different character from the exercise of professional medical judgment at issue in *Blum v. Yaretsky*. As the *Blum* Court explained, those medical judgments were made "according to professional standards that are not established by the State," 457 U.S. at 1008. In contrast, the statute here *forbids* the cable operator from exercising, with respect to leased access programming, broad editorial discretion "according to professional standards ... not established by the State." Instead it specifically authorizes a single, highly constrained decision—whether or not to ban material classified as "indecent" under a government-imposed definition.

cable operators. The majority's attempt to characterize § 10(c) as a return of "editorial control" sunders the provision from the context of its enactment as part of a broader measure seeking to suppress indecent speech, as well as from its statutory moorings as a singular, content-based exception to an otherwise flat prohibition on the exercise of private judgment. Surely if Congress adopted this kind of selective approach to other content-defined categories of speech—for example, authorizing cable operators to ban programs discussing military spending but no other category—the aim of the government's scheme of dual regulation, suppressing the disfavored speech, would be transparent.[20]

We thus have a congressionally-enacted statute that both facially discriminates on the basis of the content of speech, and has a "manifest purpose" to "burden ... speech of a particular content," *Turner Broadcasting*, 114 S. Ct. at 2461 (*either* facial content-based discrimination *or* "manifest purpose" to benefit or burden speech on the basis of content is sufficient to make the statute content-based, triggering strict scrutiny). With rare exceptions, " '[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment," *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984)).

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[20] The "impetus" for the suppression of disfavored speech thus clearly comes in the first instance from the state, and not a private actor. *Cf. Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172–73 (1972) (when "impetus" for discrimination comes from a private party, state must have "significantly involved itself" to establish state action); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 356–57 (1974) (state's passive acquiesence in shutoff policy initiated by regulated utility does not implicate state action; the utility's "exercise of the choice allowed it by state law where the initiative comes from it and not from the State, does not make its action ... 'state action'...."). *Moose Lodge* and *Jackson* implicitly suggest that when the "impetus" or "initiative" for the deprivation comes from the state—as here, through enactment of § 10(c)—state action is more likely present.

When the § 10(c) statutory scheme works as intended, and cable programmers and adult audiences are deprived of opportunities to communicate and receive indecent speech, that deprivation is "caused by the exercise of some right or privilege created by the State," *Lugar*, 457 U.S. at 937, namely the cable operator's narrow statutory authorization to ban indecent speech (and only indecent speech). And Congress and the FCC, the "part[ies] charged with the deprivation," "may fairly be said to be ... state actor[s]." *Id.* Because the dual requirements of *Lugar* are met, the deprivation is "fairly attributable" to the government, *id.*, and state action is present.

As the *Lugar* Court explained, "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power," and "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Id.* at 936. Here, a determination that state action is present does not intrude into an "area of individual freedom"—no such sphere was left after Congress denied cable operators control over the content of PEG programming in the 1984 Act, and it is patently obvious that through § 10(c) Congress has not foreshortened but rather extended the "reach of federal law" by creating a narrow, governmentally-structured choice whether to ban a single governmentally-defined category of speech. Where federal law reaches, constitutional scrutiny must follow. Nor is it unfair to attribute to the government the intended and wholly foreseeable consequence of its statute, the suppression of indecent speech. Indeed, under these circumstances it would be grossly unfair and contrary to the principles underlying the state action doctrine to allow the government to evade constitutional responsibility for its own conduct, simply because it has set up a private party as the triggerman in its carefully crafted scheme.

B. *Does § 10(c) Meet the Least Restrictive Means Test?*

Section 10(c), which authorizes cable operators to ban indecent speech on PEG channels, is fatally flawed because

the government has failed to show that the regulation will make any significant contribution toward furthering the government's asserted interest in protecting children from indecent television programming, much less that it is the "least restrictive means" to achieve that purpose. *Cf. Sable*, 492 U.S. at 126 (the means chosen must "further the articulated interest"). Where § 10(c) achieves its intended effect, the result will be a total ban on indecent speech, and therefore a total deprivation of programmers' and adult audiences' rights to communicate and receive such speech. We do not know from the agency record, however, whether the regulation will "protect" one percent, twenty percent, fifty percent, or one hundred percent of the nation's children. Indeed, that is left to the standardless discretion of cable operators. What we do know is that § 10(c), like §§ 10(a) and (b), will be of no use in helping *parents* supervise their children's viewing; the decision is taken out of their hands, and placed in the hands of their cable operator.

In addition, just as with the §§ 10(a) and (b) ban-or-block scheme, § 10(c) shields children from indecent programming only by simultaneously depriving programmers and adult viewers of their speech rights, without attempting to decouple children's access from that of adults. Consequently, to the extent § 10(c) has any effect in shielding children from indecent programming, it also impermissibly "reduce[s] the adult population ... to ... only what is fit for children." *Butler v. Michigan*, 352 U.S. at 383. I would conclude that the government has not shown that the § 10(c) permissive ban scheme is the "least restrictive means" to achieve a compelling governmental interest.

V. Conclusion

Because Section 10 is state action restricting constitutionally-protected speech, and because the government has not met its constitutionally-imposed burden of showing on this record that these provisions are the least restrictive means necessary to achieve the compelling governmental interest of protecting children in the context of the family unit, I respectfully dissent.